point their Lordships prefer to assume that the evidence given by the plaintiff that it was also stipulated in 1917 that if not paid in two years it was to remain payable on demand should be rejected as inconsistent with the express terms of the document: and they are not prepared to find that there was an implied term that it should be so payable.

The real question in the case is whether there was any agreement made in 1919, and if so, whether the plaintiff has established the agreement alleged by him. The outstanding fact is that after 1919 no interest was in fact paid nor was any claim made to have the principal repaid until at the earliest 1925. Obviously some explanation is required. The defendants supplied a plain tale. .The principal and interest were repaid at the due date. This unfortunately is untrue. The plaintiff's explanation is the alleged agreement in 1919 that the money and interest were to remain on deposit with the defendants payable on demand. It is uncontradicted save by a story which is shown to be false. In these circumstances it would appear that the real question for the tribunal of fact is whether there are inherent improbabilities or extrinsic facts justifying the Court in rejecting the plaintiff's account. Their Lordships do not find that there are. The Court of the Judicial Commissioner quite rightly commented upon the fact that three witnesses were called on the plaintiff's behalf at an early stage of the trial to support the agreements in 1917 and 1919, as alleged in the statement of claim a different set of three for each transaction. One of the last three obviously confused the story of 1919 with that of 1917: the evidence of all six has been treated as unreliable: and their Lordships do not dissent from this view.

The plaintiff must suffer the necessary disadvantage which attaches to any party who seeks to support his case in a Court of justice with unreliable evidence. And if it could be shown that he knowingly suborned false witnesses there could be no doubt as to the result of his claim. But no evidence nor any cross-examination was directed against the plaintiff in this respect, and in his evidence he makes no reference to corroborative witnesses being present. It was considered in the judgment under appeal that the fact that the plaintiff in 1925 demanded payment of the debt of Rs. 25,000 which bore a rate of interest of 6 per cent. per annum without demanding payment of the present debt which only bore a rate of 5¼ per cent. threw some doubt on the plaintiff's case.

Again the plaintiff was not asked about this and it would not be difficult to suggest reasons why a creditor might be willing to leave a larger sum outstanding even at a lower rate of interest if he were not dissatisfied with the credit of his debtor. It seems also to be overlooked that the difficulty, if difficulty there be, applies equally to the only other alternative view that there was a loan outstanding but that it was not payable on demand. That some arrangement was [172] made at the end of [172] 1919 accounting for the non-payment at the stipulated date and in succeeding years seems certain. In the careful judgment given on appeal the Court says: "Probably something did happen on the expiry of two years originally fixed, but what it exactly was we have no means of ascertaining on this record. There is something which neither party is willing to disclose." But the explanation given by the plaintiff is consistent with all the facts: the only counter-explanation was suggested to the plaintiff who was surely entitled to have an opportunity of meeting it if it is to be used against him. In all the circumstances of this case their Lordships come to the conclusion that there was no ground for reversing the decision of the trial Judge in favour of the plaintiff. The appeal should be allowed except as against defendants Nos. 2 and 3 and the decree of the Court of the Judicial Commissioner dated June 27, 1932, should be set aside: and the decree of the subordinate Judge dated October 15, 1931, should be restored. The appeal should be dismissed against the defendants Nos. 2 and 3 with costs and those defendants should also have their costs of the appeal against them in the Court of the Judicial Commissioner. The appellants should have the costs of the appeal against the other defendants here and in the Court of the Judicial Commissioner. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors: *Stanley Johnson Allen; Nehra & Co.*

---

[173] STRAITS SETTLEMENTS REPORTS [173]

PUBLISHED BY AUTHORITY

IN THE ESTATE OF LUM YOON KOW, DECD. LUM HOR CHOONG v. HEW LYE HEONG & LAM CHEOK TONG

[O.C.J. (Whitley J.) October 5, 1922]

[Penang Originating Summons No. 488 of 1921]

Practice — Removal of trustees — Allegation of breaches of trust — Whether order can be made on originating summons — Civil Procedure Code, s.68, (now Order LII, r.1).

The Court has no jurisdiction to make an order on an originating summons for the removal of trustees on grounds imputing breaches of trust.

SUMMONS IN CHAMBERS.

Saunders for the plaintiff.

A. K. á Beckett-Terrell for the 1st defendant.

Thornton for the 2nd defendant.

W. V. L. Van Someren for Lam Hor Phooi, a person having leave to attend proceedings.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Whitley J.: These proceedings were commenced by originating summons. Plaintiff, as one of the residuary legatees under the will of his father, Lum Yoon Kow, sued the defendants, as executrix and executor, respectively, and as trustees, under the said will, for certain accounts and for administration of the testator's estate. Subsequently one Lam Hor Phooi, the only other residuary legatee, obtained leave to attend the proceedings. From time to time orders were made on defendants requiring them to produce account books and vouchers for examination by plaintiff. On the 15th May, 1922, an order was granted for the usual administration account and enquiries to be taken and made and the 1st defendant was ordered to pay into Court certain monies which she alleged were in her hands.

On the 29th August plaintiff issued a summons praying for an order that the defendants be removed from the trusteeship of the estate and that two fit and proper persons be appointed in their place. In support of the application plaintiff has filed an affidavit in which he sets out that defendants have neglected to obey certain orders made against them in these proceedings, that there is friction both between the beneficiaries and the trustees and between the trustees *inter se,* which prevents the satisfactory administration of the estate, and that he verily believes that large sums have been lost to the estate by the defendants and that the current income is in danger of being lost.

The grounds on which the application is founded consist therefore of allegations which in part impute breaches of trust and in part do not.

The preliminary objection is taken by the defendants that there is no jurisdiction to entertain an application made by originating summons for the removal of trustees who are willing to continue.

Lam Hor Phooi has associated himself with defendants in this objection.

The answer of the plaintiff briefly is that if the removal of the trustees is necessary for the welfare of the trust, the Court has inherent jurisdiction to remove them, whether the proceedings have been commenced by originating summons or not.

The appointment and removal of trustees are not specifically included amongst the matters which may be determined under O.55, r.3 (section 68 of the Civil Procedure Code). If they are such matters they must be comprised in the general clause (g) "the determination of any question arising in the administration of the estate or trust." The language of this clause is wide enough to include them. The question, then, arises whether there are judicial decisions which restrict the apparent scope of the clause.

In *Re Allen, Simes* v. *Simes,* 56 L.T. 611 new trustees were appointed by the Court on an originating summons asking for general administration and the appointment of new trustees, all parties interested in the appointment being parties to the application.

It is argued on behalf of the defendants that the consent of all parties gave the Court in that case a jurisdiction which it would not otherwise have possessed.

I do not think that is the true view, because the order was expressed to be made in exercise of the Court's general jurisdiction.

In *Re Chetwynds Settlement, Scarisbrick* v. *Nevinson,* [1902] 1 Ch. 692 an originating summons was issued by one of four trustees of a settlement asking that he might be discharged from his trusteeship under section 25 of the Trustee Act, 1893, but there being no jurisdiction to make the order under that section, the summons was amended by adding all parties interested, and asking for administration of the trusts. The summons was not opposed, the only question being whether the Court had jurisdiction to make
[174] [174] the order. It was held by Farwell J. that in an action to administer a trust, the Court has inherent jurisdiction to discharge a trustee. The word "action" was there used to include proceedings commenced by originating summons.

In that case, too, the jurisdiction was regarded as inherent in the Court and not as being derived from the consent of the parties.

In *Elworthy* v. *Harvey,* 60 L.T.R. 30 cited on behalf of defendants, the plaintiff proceeded by action claiming to have it decided whether defendant was co-trustee with him of a settlement and praying that a new trustee might be appointed in defendant's place. Defendant denied that he had ever accepted the trusts or acted as trustee. It was held that relief would not have been granted under an originating summons.

I do not think that that case is really in point, because the question for determination cannot be said to have arisen "in the administration of the trust." It was therefore not within paragraph (g) of O.55 r.3.

These authorities do not, in my opinion, establish that there is no jurisdiction in the Court to remove on an originating summons trustees who desire to continue in office. But there still remains the question whether, the jurisdiction, assuming that it exists, ought to be exercised in the present case.

The practice prior to the Judicature Act, 1873, is clear from *In re Bridgman,* 29 L.J. Ch. 844 in which it was held that an application to remove a trustee on the ground of vexatious conduct could not be made upon petition, but must be by bill.

No direct authority since the Judicature Act, 1873, has been cited, possibly because trustees whose removal is sought seldom cling to office. But there have been several occasions on which opinions as to the general scope of an originating summons have been expressed.

In *Re Giles, Real and Personal Advance Company* v. *Mitchell,* 43 Ch. D. 391 at p. 398 an application was made to the Court to decide the question of priority of mortgages upon an originating summons. Cotton L.J. said of O.55 r.3 :—

> "It was intended, so far as we can judge, to enable simple matters to be settled by the Court without the expense of bringing an action in the usual way, not to enable the Court to determine matters which involve a serious question."

In *Re Stuart, Smith* v. *Stuart,* 74 L.T.R. 546 at p. 548 Stirling J. stated that in any contested case an originating summons is not the proper mode of deciding the question.

In *Dowse* v. *Gorton,* (1891) App. Cas. 190 Lord Macnaghten said :—

> "I apprehend it would not be competent for an applicant on an originating summons to ask for or obtain otherwise than by consent an order founded on breach of trust or enquiries pointing to wilful default."

To apply those *dicta,* the present application involves a serious question, it is contested and it is founded in part on an alleged breach of trust, I hold then that originating summons is not the proper mode by which it should be made. The preliminary objection therefore is upheld.

Preliminary objection upheld.

Solicitors : *Presgrave & Ivens; Wreford & Thornton; Logan, Ross & Samuel.*